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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 120.

CHARLES ZARTARIAN, APPELLANT,

vs.

GEORGE B. BILLINGS, UNITED STATES COMMISSIONER AT THE PORT OF BOSTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF OF APPELLANT.

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STATEMENT OF THE CASE.

This is an appeal by Charles Zartarian from an order of the Circuit Court of the United States for the District of Massachusetts, denying the petition for a writ of *habeas corpus* brought by the petitioner in behalf of his minor daughter, Mariam Zartarian.

The decree was made on the following facts, which were agreed upon by the parties hereto.

"The petitioner, Charles Zartarian, formerly a subject of the Sultan of Turkey, became a naturalized citizen of the United States on September 12, 1896, at the Circuit Court of Cook County, in the state of Illinois. That his daughter Mariam, on whose behalf this petition is brought, is a girl between fifteen and sixteen years of age, and was born just prior to the petitioner's leaving Turkey. That in the latter part of the year 1904 the Turkish government, at the request of the United States minister at Constantinople, granted permission to the petitioner's wife, minor son, and his said daughter, Mariam, to emigrate to the United States, it being stipulated in the passport issued to them that they could never return to Turkey. That on March 22, 1905, the Hon. G. V. L. Meyer, then United States ambassador at Rome, Italy, issued a United States passport to your petitioner's said wife and daughter. (See Transcript of Record, page 3.) That said Mariam arrived at Boston from Naples, Italy, on April 18, 1905, and that on April 18, 1905, she was found

to have trachoma, and was debarred from landing by a board of special inquiry appointed by the United States Commissioner of Immigration for the port of Boston."

(See page 4, Transcript of Record.)

The Court heard no evidence, but denied the petition on the ground that it appeared as a matter of law from the facts set out in the petition and the agreed statement of facts, that Mariam Zartarian was an alien, and therefore not entitled to land.

Thereupon the petitioner assigned the following grounds of error. (See Transcript, page 5.)

First. The Court erred in refusing to rule that upon all the evidence the writ should issue as prayed for.

Second. The Court erred in ruling that Mariam Zartarian was an alien immigrant.

Third. The Court erred in ruling that trachoma was a loathsome or a dangerous contagious disease.

Fourth. The Court erred in refusing to rule that said Mariam Zartarian was to be considered a citizen of the United States in accordance with 2172 Revised Statutes of the United States.

Fifth. The Court erred in refusing to rule that said Mariam Zartarian was restrained of her liberty without due process of law.

Facts and Law Thereon.

The general questions raised under the assignment of error, and the agreed statements of facts are:

First. Was the child Mariam Zartarian an alien within the meaning of the "Act to Regulate the Immigration of Aliens into the United States," approved March 3, 1903? and if so

Second. Does the record show any sufficient ground for her exclusion?

The appellant contends that if the girl was not an alien within the intent and meaning of the Act of March 3, 1903, the commissioner had no authority to detain or deport her, and the final order of the Circuit Court must be reversed.

Gonzales *vs.* Williams, 192 U. S. 1.

Habeas Corpus the Proper Remedy.

This case is to be distinguished from United States *vs.* Sing Tuck, 194 U. S. 161, which held that *habeas corpus* did not lie until after an appeal from the decision of the commissioner had been taken to the Secretary of Commerce and Labor, because by Section 10 of the Act of March 3, 1903, there is no appeal to the Secretary from the decision of a board of special inquiry, based upon the certificate of the examining medical officer.

Hence on the question of law relating to status, *habeas corpus* is the only remedy.

United States *vs.* Wong Kim Ark, 169 U. S. 649.

Citizenship or Alienage a Question of Law.

The question raised above as to citizenship or status is purely one of law, there being no dispute as to the facts. This being so, the case is not governed by the recent decision of United States *vs.* Ju Toy, 198 U. S. 253, for the question passed on in that case by the Secretary of Commerce and Labor was in reality as to the place of birth of the petitioner, a question of fact, and the Court, by a majority opinion, held that the decision of such an executive officer on a question of fact was final. This issue, being, however, one of law, follows

Gonzales *vs.* Williams, *supra.*

It is contended in behalf of the commissioner that the girl, Mariam, does not come within Sect. 2172, Rev. Stats. U. S. (U. S. Comp. Stats., 1901, p. 1334).

This section provides that "the children of persons who have been duly naturalized under any law of the United States, . . . being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who are now, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof."

The use of the qualifying phrase "if dwelling in the United States," makes the meaning of this law somewhat uncertain. Is it intended that minors become citizens if they are residing in the United States at the time of the naturalization of the parent? or does it mean that they are to be considered as citizens only while they are residing in the United States?

As bearing on the question, we may note that through the declaration of intention made by a parent, his minor children acquire a certain inchoate status.

U. S. Rev. Stats., § 2168, U. S. Compt. Stats., p. 1332.
See Boyd *vs.* Nebraska, 143 U. S. 177.

And in case of the death of the parent his widow and children "shall be considered as citizens of the United States, and shall be entitled to all the rights and privileges as such, upon taking the oaths prescribed by law."

U. S. Rev. Stats., § 2168.

Congress has also provided for certain cases where an alien has taken up his residence in this country, and has filed his preliminary

declaration to become a citizen, and thereafter sends for his wife and minor children to join him.

See U. S. Comp. Stats., Supp. 1903, p. 185,

where is found this provision:

"Whenever an alien shall have taken up his permanent residence in this country, and shall have filed his preliminary declaration to become a citizen, and thereafter shall send for his wife or minor children to join him, if said wife, or either of said children, shall be found to be affected with any contagious disorder, and if it be proved that said disorder was contracted on board the ship in which they came, and is so certified by the examining surgeon at the port of arrival, such wife or children shall be held, under such regulations as the Secretary of the Treasury shall prescribe, until it shall be determined whether the disorder will be easily curable, or whether they can be permitted to land without danger to other persons; and they shall not be deported until such facts shall have been ascertained."

But this provision refers only to the children of resident aliens, and it is not to be presumed that Congress intended to extend to such persons greater privileges than were given to the children of naturalized citizens.

This Court has decided, however, that a person not a citizen is not necessarily an alien within the meaning of the Act of 1903.

See Gonzales *vs.* Williams, *supra.*

The test may be that of allegiance, and it is respectfully submitted that on the facts of this case Mariam Zartarian had renounced her former allegiance and in good faith had submitted to the allegiance of the United States as far as it was possible to do so.

Regarding the rights acquired by a minor child after the declaration of intention by his parent under U. S. Rev. Stats., 2168, we find the following language in the opinion of Mr. Chief Justice Fuller in Boyd *vs.* Nebraska, 143 U. S. at 178: "Clearly minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to the citizenship which the act of the parent has initiated for them. Ordinarily this election is determined by application on their own behalf, but it does not follow that an actual equivalent may not be accepted in lieu of a technical compliance."

In the present case we have the minor child of a naturalized citizen, who left her native country, Turkey, accompanied by her mother, with a Turkish passport allowing them to depart from the country, said passport containing the stipulation that they should never return to Turkey, and having been granted by the Turkish govern-

ment at the request of the American minister. (See "Agreed Facts," page 4, Transcript of Record.)

On March 22, 1905, the mother, in behalf of herself and her minor daughter, applied for, and received, a United States passport from the United States ambassador at Rome, Italy. (See "Agreed Facts," Transcript of Record, page 4.)

And to obtain this passport, took the oath of allegiance required by law

See U. S. Comp. Stats., 1901, p. 2765.
Also the rules governing the granting of passports.

It would seem, therefore, that the said Mariam, or her mother in her behalf, had done everything possible to abandon her foreign allegiance in order to assume the rights incident to her father's status as an American citizen, and was within the intent and meaning of Sect. 2174, Rev. Stats.

See also, Boyd *vs.* Nebraska, *supra.*

And having submitted to the allegiance of the United States at the implied invitation of that government, cannot be regarded as an alien, but comes within the opinion of this Court in

Gonzales *vs.* Williams, *supra.*

Moreover, under Rev. Stats., 2172, if the child Mariam had landed and resided in the country a few weeks, or perhaps days, it would appear that she could maintain a claim to be regarded as a citizen by virtue of her father's naturalization.

See Ruling of Department of State, Foreign Relations, 1881, p. 53; also 1885, pp. 395–6.

And it is submitted that if she should become a public charge, under Sect. 20 of the Act of March 3, 1903, within two years of her landing, she could not then be deported as provided by said section.

The case of United States *vs.* Williams, 132 Federal Reporter, 894, was cited in the Circuit Court as decisive of the present case, but in that case the father did not take out his final papers until the attempted landing of the children, and their detention at Ellis Island.

Sufficiency of Record.

Upon the second question raised, the petitioner contends that as there was no evidence introduced in the Circuit Court, the case having been decided on the petition and the agreed statements of facts, it not appearing of record that "trachoma," so-called, is either a "loathsome or a dangerous contagious disease," since this did not affirmatively appear by the agreed statement, the judge of the

Circuit Court erred in ruling as a matter of law that such was the fact.

Mayhew *vs.* Durfee, 138 Mass. 584.
And see also, Schwartz *vs.* Boston, 151 Mass. 226,

in which case Mr. Justice Holmes, giving the opinion of the Court, says: "This case having been submitted upon an agreed statement of facts, and no power to draw inferences of fact having been given in express terms, the Superior Court was confined to ruling upon the effect of the facts stated as matter of law. The question here is whether the ruling was right, not whether there was any evidence warranting a finding."

Neither can the inference now be drawn by this Court that the child was excluded as having a loathsome or dangerous contagious disease.

Gallagher *vs.* Hathaway Mfg. Co., 169 Mass. 578.
Miller *vs.* Horton, 152 Mass. 540, 548.

Respectfully submitted,

DANIEL B. RUGGLES,

Attorney for Petitioner